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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 713

W. C. NABORS, d b a,
W. C. NABORS COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Chief Justice and Associate Justices Of The Supreme Court Of The United States:

The Petitioner, W. C. NABORS, an individual, formerly doing business as W. C. NABORS COMPANY, respectfully prays that a Writ of Certiorari issue to review the Decision[1] and Supplemental Decree[2] of the United States Court of Appeals for the Fifth Circuit, entered on October 3, 1963, and November 19, 1963, respectively, granting in part the cross-petition of the National Labor Relations Board for the enforcement of an Order which it issued against the

[1] Appendix A to this Petition.
[2] Appendix B to this Petition.

Petitioner on December 7, 1961 and its Supplemental Decision and Order on March 29, 1962 (Pet. App. 305).[3]

OPINION BELOW

The Findings of Fact, Conclusions of Law and Order of the National Labor Relations Board (Pet. App. 216, et. seq. 305, et seq.), are reported in 134 N.L.R.B. 1078. The Opinion of the Court of Appeals is reported in 323 F. (2d) 686.

JURISDICTION

The Supplemental Decree of the Court of Appeals was entered on November 19, 1963. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (Act of June 25, 1948 Ch. 646, Sec. 1; 62 Stat. 928) and 29 U.S.C., Sec. 160(e) and (f) (As amended August 28, 1958, Pub. L. 85-791, Sec. 13, 72 Stat. 945; September 14, 1959, Pub. L. 86-257, Title VII, Secs. 704(d), 706, 73 Stat. 544).

QUESTIONS PRESENTED

1. Whether the Board and the Court below has decided an important question of Federal law which has not been, but should be, settled by this Court.

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[3] The record on the petition in the present case consists of (1) transcript of the record printed by the Court below; (2) the appendices of the briefs containing points of the record relied upon by each party and submitted by the petitioner and the Board in the Court of Appeals; and (3) a typewritten transcript of the entire record lodged with the Clerk. The printed transcript of the record in the Court below has been designated by the Clerk as Volumes I and II, being the Appendices to Respondent's (The Board's) Brief and Volume III as the appendix to the Petitioner's Brief. For Convenience, however, the appendices of the petitioner and the Board have been designated as "Pet. App." and "Resp. App.", respectively. In the event the writ is granted a record will be printed by the Clerk pursuant to stipulation of the parties.

2. Whether the Board and the Court of Appeals has decided a Federal question in a way in conflict with the applicable decisions of this Court.

3. Whether the decision of the Court below, in other respects, is in real conflict with the decision of this Court and the Courts of Appeals of the several Circuits.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (Act of June 23, 1947, Ch. 120, Title 1, Sec. 101, 61 Stat. 136; 29 U.S.C. 151, et seq.), are as follows:

"Par. 160 — Prevention of Unfair Labor Practices —

"(c) — Reduction of testimony to writing; findings and orders of Board.

"The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor

organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed."

* * * * *

"(e) Petition to Court for Enforcement of Order; Proceedings; Review of Judgment.

The Board shall have power to petition any United States court of appeals, or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice

thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgement and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."

"(f) Review of Final Order of Board on Petition to Court.

"Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

* * * * *

"(i) Expeditious Hearings on Petitions.

"Petitions filed under this Act shall be heard expeditiously and if possible within ten days after they have been docketed."

Article 2334 of the Louisiana Statutes Annotated — Civil Code provides in part as follows:

"Article 3534. The following actions are prescribed by one year:

. . . . . .

"That of workmen, laborers and servants, for the payment of their wages. . . . "

Article 3536 of the Louisiana Statutes Annotated — Civil Code provides in part, as follows:

"The following actions are prescribed by one year:

. . . . . .

"That for injurious words, whether verbal or written, and that for damages caused by animals, or resulting from offenses or quasi offenses."

SUMMARY STATEMENT

Your Petitioner, W. C. Nabors, is an individual, domiciled and residing in the City of Mansfield, Parish of DeSoto, State of Louisiana, and from the year 1916 until August 1, 1959, was engaged in the production and sale of semi-trailers, truck bodies, and semi-trailers of the tonnage class, as well as parts to service said units. During the period from 1916 to and including July 31, 1959, Petitioner was the sole proprietor of a company known as the W. C. Nabors Company of Mansfield, Louisiana (Pet. App. p. 232).

On November 4, 1948, the National Labor Relations Board issued a complaint against your Petitioner, charging certain unfair labor practices affecting commerce within the meaning of Sec. 8, Sub-sec. (a) (1) and (3) and Sec. 2, Subsecs. (6) and (7) of the Act. Hearings on the Complaint were held at Mansfield, Louisiana, on various dates between December 7, 1948, and January 15, 1949, and on October 26, 1949, an Intermediate Report sustaining all of the alleged charges, with the exception of a few, was rendered by the Trial Examiner of the Board (89 N.L.R.B. 538).

The Board rendered its Decision and Order on April 19, 1950, upholding the Trial Examiner and his determination that certain unfair labor practices in violation of the Act had been committed by your Petitioner or his supervisory employees, overruling certain other findings of the Trial Examiner, and finding that the Petitioner had violated Sec. 8(a)(1) and Sec. 8(a)(3) of the Act, by discriminating in the hire and tenure of employment of certain employees, but finding that Petitioner was economically justified in laying off some of his employees on April 8, 1948 (89 N.L.R.B. 538).

The Board filed a Petition for enforcement of its Order and your Petitioner filed a cross-petition to set aside said Order, and after full consideration thereof, the Court of Appeals on April 29, 1952, entered a decree against your Petitioner enforcing the Board's Order, and rendering an opinion thereon at 196 F. (2d) 272, wherein it was found in agreement with the Board: inter alia, that your Petitioner was economically justified in laying off some of his employees on April 8, 1948.

The Decree of the Court of Appeals adopted the enforcement Order attached to said Decree as Appendix "A" and further decreed, that your Petitioner should make whole the employees named thereiff for any loss of pay suffered by reason of Petitioner's discrimination against them. Petition for Writ of Certiorari to the United States Supreme Court was timely filed but certiorari was denied on October 27, 1952 (344 U.S. 865).

By reason of the layoff of April 8, 1948 (the date of the alleged discrimination of the nineteen employees), there were two hundred and twenty-eight production and maintenance employees (excluding supervisors) remaining in the employ of Petitioner in his Mansfield Plant (Pet. App. p.

184). Subsequent to the April 8th, 1948 layoff, Petitioner was impelled for business and other economic reasons, to reduce further the number of such production and maintenance employees at his Mansfield plant, so that between the dates April 8—December 31, 1948, there was a net reduction of twelve production and maintenance employees in his plant; in the year 1949 there was a net reduction of fifty-one employees (Pet. App. pp. 184, 186).

Subsequent to the denial of the Writ of Certiorari by the United States Supreme Court, Petitioner and his Counsel held numerous conferences with the agents of the Board's Regional Director for the 15th Region and carried on voluminous correspondence with representatives of the Board in an effort to acquaint the Board with the difficulties with which Petitioner was confronted in offering re-employment to all of the men named in the Appendix "A" of the Lower Court's Decree (Pet. App. 202-208 inclusive).

On February 11, 1955, the Board initiated Civil Contempt Proceedings against your Petitioner. Petitioner timely filed an answer thereto and a supporting brief, and the Court of Appeals, having considered the brief and arguments of the party at a pre-hearing conference, entered an Order on March 29, 1955, continuing the matter for forty-five days and directing the parties to "make reasonable effort to negotiate an adjustment of the issues and after which either party might move for such order as the circumstances might warrant."

Pursuant to the Court's Order of March 29, 1955, the parties entered into a stipulation which was filed with the Court of Appeals, and, after consideration thereof, the court entered an Order dated May 31, 1955, approving the stipulation and providing, inter alia, that, "the question relating to making whole the employees named in the Decree

for losses sustained by them were subject to final determination by interlocutory hearings before the National Labor Relations Board and proceedings before this Court . . . " (Appendix "A" P. 2a.)

Subsequent to the entry of the Order of the Court, dated May 31, 1955, the Board's Regional Director for the 15th Region failed and refused to issue a back pay specification until March 25, 1959.

On September 9, 1960, the Trial Examiner issued his Supplemental Intermediate Report, in which he found that eleven of the claimants were entitled to specific amount of back pay. On December 7, 1961, the Board issued its Supplemental Decision and Order, and on March 29, 1962, its Correcting Order that the Petitioner pay to the eleven claimants, as net back pay, the following amounts:

Jeter C. Adams	$12,876.69
Jesse L. Brown	17,845.34
Leroy P. Brown	1,063.94
Vernon D. Davis	16,872.57
Henry J. Hatcher	544.86
Alex C. LaFitte	10,188.15
Luther W. McNeese	14,314.11
William D. Roark	728.99
Lawrence L. Whitten	2,374.82
Thomas J. Williams	10,628.38
Willie T. Williams	12,951.43
TOTAL	$100,482.48

(Pet. App. 30a; Resp. App. 720, 721).

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals has decided an important question of federal law which has not been, but should be decided by this Court.

A. The decision of the Court of Appeals that the back pay claims were not prescribed by Articles 3534 and 3536 of the Louisiana Civil Code or by laches is a case of first impression.

1.

The Court of Appeals, assuming *arguendo*, that the Back Pay Claims were barred by the Louisiana one-year prescriptive period or by laches; nevertheless held that such defense may not be asserted against the United States or any agency thereof. In so holding, the Court relied principally upon *United States* v. *Summerlin*, 1940, 310 U.S. 414, 416, 60 S. Ct. 1019, 84 L. Ed. 1283. The latter case is inapposite since it involved the enforcement of a claim which had been assigned to the Federal Housing Administrator, acting on behalf of the United States. The Court said at 310 U.S. page 416 (60 S. Ct. at P. 1020), "The Claim *assigned* to the Federal Housing Administrator acting on behalf of the United States became the *claim* of the United States, and the United States, thereupon *became entitled to enforce it*" (emphasis supplied). No contention has or could be made in the case at bar that the back pay claims here involved have been assigned to the United States. Contrary to the language of the Court of Appeals below, *United States* v. *Summerlin*, *supra*, does not stand for the proposition that the "* * * United States, or any agency thereof, is not bound by state statutes of limitation or subject to the defense of laches in enforcing a private right." The

language of this Court in the *Summerlin* case is that " * * * the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing *its rights*. * * *" Implicit in this language is the well known doctrine that such defenses are not available as against the United States wherein it is acting as a soverign power to enforce a claim which has been assigned to it.

Thus, the decision of the Court below is in direct conflict with the decision of this Court in *United States* v. *Beebe*, 127 U. S. 388, 32 L. Ed. 191, 8 S. Ct. 1083.

The Court of Appeals likewise relied on this Court's decision in *Phelps Dodge Corp.* v. *NLRB*, 1941, 313 U. S. 177, 193, 61 S. Ct. 845, 852, 85 L. Ed. 1271, quoting language taken out of context from such decision. Neither *Phelps Dodge* nor the other decisions cited in the quotation relied on by the Court of Appeals were concerned with back pay or the question of prescription or laches. These cases were concerned with the theory then prevalent that the National Labor Relations Act vested in the Board the exclusive remedy for the enforcement of the Act. *Phelps Dodge* was decided by this Court in 1941 and *National Licorice Co.* v. *NLRB*, 309 U. S. 350, 60 S. Ct. 569, 84 L. Ed. 799 and *Amalgamated Workers* v. *Consolidated Edison Company*, 309 U. S. 261, 60 S. Ct. 561, 84 L. Ed. 738 were decided in 1940. As such, the three last cited cases pre-dated *Nathanson* v. *NLRB*, 1952, 344 U. S. 25, 73 S. Ct. 80, 97 L. Ed. 23; *U. A. W.* v. *Russell*, 1958, 356 U. S. 634, 78 S. Ct. 932, 2 L. Ed. (2d) 1030 and *Smith* v. *Evening News Association*, 1962, 371 U. S. ....., 83 S. Ct. ....., 9 L. Ed. (2d) 246, all of which have relaxed the exclusive remedy theory. Although *Nathanson* and *Russell* were cited in Petitioner's brief to the Court below, the Court neither mentioned nor distinguished them.

In *Nathanson* v. *NLRB*, *supra*, this Court, in denying the priority of back pay claims in a bankruptcy procedure, had the following to say at 344 U.S., page 27:

> "We do not, however, agree with the lower Court that this claim, enforceable by the Board, is a debt due to the United States within the meaning of R.S. Sec. 3466, 31 U.S.C.A. Sec. 191, and therefore entitled to priority under Sec. 64, Sub. A(5) of the Bankruptcy Act. It does not follow that because the Board is an agency of the United States, any debt owed it is a debt owing the United States within the meaning of R.S. Sec. 3466. The priority granted by that statute was designed to secure an adequate public revenue to sustain the public burdens and discharge the public debts. There is no function here of assuring the public revenue. The *beneficiaries of the claims are private persons as was the receiver in American Surety Co.* v. *Akron Savings Bank*, 242 U.S. 557, 29 S. Ct. 686, 53 L. Ed. 651." (emphasis supplied)

Similarly, in *N.L.R.B.* v. *Deena Artware, Inc.*, (CA 6, 1958), 251 F. (2d) 183, a back pay case, wherein the Court denied the Board's motion for production of certain documents, the Court said:

> "But in the absence of contempt proceedings, the present proceeding is purely a proceeding for the enforcement of private individual rights, namely, an attempt to collect from an insolvent corporation money judgments running in favor of private individuals. As the Supreme Court said in *Nathanson* v. *N.L.R.B.*, 344 U.S. 25, 28, 'The policy of the National Labor Relations Act is fully served by recognizing the claim for back pay as one to be paid from the estate.'
>
> "As pointed out in the *Nathanson case*, 344 U.S. 25, 27-28, the beneficiaries of the back pay awards are private persons for whom the Board is acting as agent. *The claims have no status or priority different from*

that enjoyed by other unpaid wage claims." (emphasis ours)

So saying, the Court suggested that the claimants enforce their remedies by proceeding in courts of original jurisdiction.

Similarly, in *U.A.W. v. Russell*, 356 U.S. 634, 2 L. Ed. (2d) 1030, 78 S. Ct. 932, an employee who was denied access to his employer's plant by a striking union, brought action against the union in the circuit court, Morgan County, Alabama, claiming compensatory damages for loss of earnings, mental anguish and punitive damages, and, after a trial by jury, received a jury verdict of $10,000. On appeal to this Court, it was argued that the National Labor Relations Act preempted the field in this area, since, under Section 8(b)(1)(A) of the Act the National Labor Relations Board may award back pay to an employee who has suffered a wage loss as a consequence of union conduct which was an unfair labor practice. In affirming the jury verdict in favor of the employee, this Court had the following to say:

> "In the instant case, there would be no 'conflict' even if one forum awarded back pay and the other did not. There is nothing inconsistent in holding that an employee may recover lost wages as damages in a tort action under state law, and also holding that the award of such damages is not necessary to effectuate the purpose of the Federal Act.
>
> "In order to effectuate the policies of the Act, Congress has allowed the Board, in its discretion, to award back pay. Such awards may incidentally provide some compensatory relief to victims of unfair labor practices. This does not mean that Congress necessarily intended this discretionary relief to constitute an exclusive pattern of money damages for private injuries. Nor do we think that the Alabama tort remedy, as applied in this case, altered rights and duties affirmatively established by Congress." (356 U.S. 644, 645; 2 L. Ed. (2d) 1038, 1039).

In *Smith* v. *Union News Association*, *supra* (decided last term), the aggrieved employees filed suit for breach of a collective bargaining contract in the Michigan State Courts. Although the allegations of the complaint, if proven, were sufficient to constitute an unfair labor practice under the National Labor Relations Act and would entitle the employees to recovery of back pay, nevertheless this Court held that the subject matter of the suits was not within the exclusive jurisdiction of the Board, and that the employees had the choice of filing suit in the State Courts or of filing a complaint before the Board.

Thus, if, as stated in *Nathanson*, supra, and followed in *Decida Artware*, *supra*, the Board, in prosecuting back pay claims, is merely serving as a public agency in the public interest for the purpose of enforcing the private individual rights of the claimants involved, and if such rights are enforceable under the state law, as held in the *Russell* case, and the *Evening News Association* case, then, of course, there could be no difference between this proceeding and the one which was the basis for the action in *Loftus* v. *Steel Const. Co.* (CA 5), 129 F. (2d) 118, and back pay claims sought to be collected herein are no more than wage claims which, under Article 3534 and 3536 of the Louisiana Civil Code, are prescribed one year after the remedy becomes available.

Therefore, when the Court of Appeals entered its Order of May 31, 1955, in the instant case, it was incumbent upon the Board or the claimants involved to prosecute their claims for the collection of back pay, since their remedy accrued at that time, such claims then having become capable of liquidation. Therefore, upon the failure of the Board, or the individuals involved, to so prosecute such claims within one year thereafter, such claims became prescribed by Articles 3534 or 3536 of the Louisiana Civil Code. The de-

cision of the Court of Appeals below is therefore in conflict with *United States* v. *Beebe*, *supra*. Additionally, the question presented is one which has not been, but should be settled by this Court in view of *Nathanson* v. *N.L.R.B.*, *supra*, *U.A.W.* v. *Russell*, *supra* and *Smith* v. *Evening News Association* (see the language contained in Mr. Justice Black's dissent at 9 L. Ed. [2d] page 252).

3.

The Court of Appeals further held that the back pay claims were not barred by laches and that the evidence offered by Petitioner to show irreparable injury caused by the delay was irrelevant.

In so holding the Court ignored the settled law that laches may be plead against a governmental agency where, as here, it is claiming for the use and benefit of an individual, or for the enforcement, or the protection of a private and proprietory right. 30 C.J.S. *Equity*, Sec. 114, page 526, and Authorities there cited. Likewise, it has been said:

> "Long neglect to take advantage of leave given by Court to assert a right by bill or cross bill may bar the right to file it; and the right to enforce an Order of Court may be lost by laches." 30 C.J.S. *Equity*, Sec. 115, p. 530.

A delay in asserting a claim operates as evidence against the justice of enforcing it and if, as in this case, such delay is unexplained, it operates by way of evidence against the justice of the right asserted and will justify a presumption against the existence or validity of the right, or the presumption that said claim has been abandoned or waived. 30 C.S.J. *Equity*, Sec. 116, p. 538. Likewise, where inexcusable delay in the assertion of a right is shown, a presumption will be indulged that the adverse party would be prejudiced by the enforcement of such claim. 30 C.J.S.

Equity, Sec. 116, page 538. Finally, where inexcusable delay would result in the impossibility of placing the parties *in status quo*, and the enforcement of the right would work inequity, relief will be denied because of laches. 30 C.J.S. *Equity*, Sec. 118, p. 540.

Therefore, it was error to hold that a delay of nearly four years from the date of entry of the Court's order of May 31, 1955, until Petitioner was served with the Back Pay Specification in this case is not inexcusable delay on the part of the Board. Nor can it be said that such an inordinate delay did not result in irreparable harm and damage to Petitioner's business that made it impossible for said business to remain in *status quo* from the date of the Court's Order until the service of the Back Pay Specification. Petitioner attempted to offer evidence of the amount and scope of the injuries and damage sustained by reason of said delay but was precluded from so doing by the Trial Examiner (Pet. App. 199-205).

Likewise, it is submitted that the Court of Appeals was in error in holding that the inordinate delay which occurred in the case at bar did not contravene the provisions of Sections 6(a) and 10(c) of the Administrative Procedure Act [Act of June 11, 1946, c. 324, 60 Stat. 237, as amended; 5 U.S.C. Sections 1005(a) and 1009(c)]. *Deering Milliken, Inc.* v. *Johnston* (CA 4, 1961), 295 F. (2d) 856, 860, 861, 863; *N.L.R.B.* v. *Superior Fireproof Door and Sash Co., Inc.* (CA 2, 1961) 289 F. (2d) 723, at p. 723; *N.L.R.B.* v. *National Plastic Products Co.* (CA 4, 1949), 175 F. (2d) 755, 760; *N.L.R.B.* v. *Norfolk Shipbuilding and Drydock Corporation* (CA 4, 1949), 172 F. (2d) 813, 815, 816.

Therefore, the Board's attempt to enforce these back pay claims after a delay of nearly four years from the date they became capable of liquidation was an unconscionable burden upon this Petitioner which clearly exceeded the

Board's authority in that the enforcement of these claims under the circumstances of this case is not only violative of the Administrative Procedure Act but is a punitive measure which clearly transcends the Board's powers to enforce, in the words of the Trial Examiner, "the broad remedial and public policies of the Act." Remedial power is one thing, but when coupled with the arbitrary and capricious exercise of such powers in a manner calculated to do irreparable harm to the employer's business, as in this case, it becomes a punitive measure clearly beyond the scope of the Congressional purposes of the Act, or, for that matter, of the protection of the Constitution. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 83 L. Ed. 126, 59 S. Ct. 206; *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11-12, 85 L. Ed. 6, 61 S. Ct. 77.

In view of the above-cited authorities and the ordinary principles of equity, the action of the Trial Examiner, not only in overruling Petitioner's defense of laches, but also in arbitrarily excluding all evidence which would bear on this issue, amounted to such a denial of due process of law as was condemned in the following decisions, among others: *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093; *NLRB v. Tennessee Carolina Transportation, Inc.* (CA 6), 226 F. (2d) 743; *NLRB v. Burns, et al.* (CA 8) 207 F. (2d) 434; *NLRB v. Bryan Mfg. Co.*, (CA 7) 196 F. (2d) 477; *Donnelly Garment Co. v. NLRB* (CA 8) 123 F. (2d) 215, and the Court of Appeals erred in sustaining the Trial Examiner's ruling in this regard.

II.

The decision of the Court of Appeals regarding the inclusion of "profit shares" as gross back pay is an important question regarding the interpretation of the National Labor Relations Act which has not been, but should be settled by this Court.

The inclusion of the profit shares as gross back pay in the instant case is not only speculative and conjectural, but it is also punitive, for there could be no way in which it could be determined that any one of the claimants in this case would have been on Petitioner's payroll, in good standing, at any one of the given dates upon which Petitioner may have granted these profit shares during the back pay period. Nor is there any way of determining the number of hours any one claimant would have worked during each such period.

The Board's powers are said to be remedial, rather than punitive and in furtherance of the public policies and consideration of the Act. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 83 L. Ed. 126, 59 S. Ct. 206; *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 83 L. Ed. 627, 59 S. Ct. 490 and allowances of back pay are granted not by way of penalty against any particular employer, but in furtherance of the policies of the Act. *NLRB v. Killoran* (C.A. 8) 122 F. (2d) 609.

It was conceded by the Trial Examiner and the Court of Appeals that the granting of the "profit shares" in this case was merely a unilateral action on behalf of Petitioner, which was unenforceable, legally or morally if he did not choose to grant it.

The provisions of Section 7(d)3(a) of the Fair Labor Standards Act [29 U.S.C.A. Sec. 207(d)(3)(a)] recognizes that the employer has this right and specifically excludes the discretionary type payment here under consideration

from the computation of the "regular rate" of pay for overtime purposes. See also Section 778.6(d) of Title 29 of the Code of Federal Regulations and the distinction drawn by the Board in the *Nibco-Beaunit-Pond* case, 97 NLRB 165, 166 fn. 4 (and see dissenting member Murdock's comments at page 170).

The inclusion by the Trial Examiner of the "profit share" payments in the computation of gross back pay under the circumstances of this case, clearly exceeds the authority of the Board. The principle involved is analogous to the one involved in *Republic Steel Corporation* v. *NLRB*, 311 U.S. 7, 85 L. Ed. 6, 61 S. Ct. 77. In that case the Board had ordered the Company to deduct from the back pay due certain discriminatees, the amounts which they had received in "work relief" projects and pay such amounts to the United States. This Court held that the Board had clearly exceeded its authority in so doing. 311 U.S. 7, 11-12, 85 L. Ed. 6, 61 S. Ct. 77.

It is therefore submitted that the inclusion of the "profit shares" as gross back pay in this case, exceeds the authority of the Board. The profit shares here under consideration were not granted pursuant to a mutual understanding between employer and employee. It was a unilateral action of the employer which was unenforceable if he did not choose to grant it. Further, there is a vast distinction between the circumstance of requiring an employer to bargain collectively regarding a similar payment and that of forcing upon him, under the guise of a remedial purpose of the Act, an obligation which is at the least speculative and conjectural, and certainly not capable even of a "reasoned conclusion" upon which the amount thereof might be determined. To do so would inflict upon the Petitioner punitive measures not contemplated by the Act. *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7.

CONCLUSION

Wherefore, we respectfully submit that this Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit should be granted.

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Attorneys for Petitioner

Wells, Duncan and Beard,
Of Counsel

CERTIFICATE OF SERVICE

I, Louis H. Beard, one of the attorneys for W. C. Nabors, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 27th day of December, 1963, I served copies of the foregoing Petition for Writ of Certiorari on the United States of America, Respondent, by mailing copies in duly addressed envelopes air mail prepaid to the Solicitor General, Department of Justice, Washington 25, D.C.; Marcel Mallet Prevost, Esq., Assistant General Counsel, National Labor Relations Board, Washington, D.C. 20570.

Louis H. Beard
Attorney for Petitioner

APPENDIX "A"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19530

W. C. NABORS, d/b/a W. C. NABORS COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition to Review a Supplemental Decision and Order of the National Labor Relations Board and Cross Motion for the Entry of a Supplemental Decree Enforcing Said Order.

(October 3, 1963.)

Before RIVES, JONES and BROWN, Circuit Judges.

RIVES, Circuit Judge: Pursuant to the opinion reported as *NLRB* v. *Nabors*, 5 Cir. 1952, 196 F. 2d 272, this Court, on June 28, 1952, entered its decree upholding the Board's determination that on April 8, 1948, the petitioner discriminatorily discharged, among others, the 11 employees involved in the present decision because they had engaged in union activity, and enforcing the order of the Board, in 89 NLRB 538 which directed the petitioner to make whole the employees involved.

On February 11, 1955, the Board initiated civil contempt proceedings against the petitioner, alleging a failure to comply with the decree enforcing the Board's order. The parties thereafter entered into a stipulation which was filed

with this Court, and the Court entered an order dated May 31, 1955, approving the stipulation and providing, *inter alia*, that "the questions relating to making whole the employees named in the Decree for losses sustained by them were subject to final determination by interlocutory hearings before the National Labor Relations Board and Proceedings before this Court . . . ."

The back pay specification did not issue until March 25, 1959, nearly four years after this Court's order of May 31, 1955. On September 9, 1959, the Trial Examiner issued his Supplemental Intermediate Report, finding that 11 of the claimants were entitled to specific amounts of back pay. On December 7, 1961, the Board issued its Supplemental Decision and Order, and on March 29, 1962, its Correcting Order that the petitioner pay to the 11 employees involved in this proceeding as net back pay the following amounts:

Peter C. Adams	$12,876.69
Jessie L. Brown	17,845.34
Leroy P. Brown	1,063.94
Vernon D. Davis	16,872.57
Henry J. Hatcher	544.86
Alex C. Lafitte	10,188.15
Luther W. McNeese	14,314.11
William D. Roark	728.99
Lawrence L. Whitten	2374.82
Thomas J. Williams	10,628.38
Willie T. Williams	12,951.43

The petitioner insists that the back pay claims are prescribed by Articles 3534[1] and 3536[2] of the Louisiana Civil

[1] In pertinent part:
"Article 3534. The following actions are prescribed by one year . . .
"That of workmen laborers and servants for the payment of their wages . . ."

[2] In pertinent part:
"The following Actions are prescribed by one year . . .
"That for injurious words, whether verbal or written and that for damages caused by animals or resulting from offenses or quasi offenses . . ."

s Code, or else are barred by laches. The claimed prescriptive period is that between this Court's order of May 31, 1955 and the issuance of the back pay specification on March 25, 1959.

We may assume, arguendo, that that delay of nearly four years was such as to constitute laches or as to prescribe a private action for wages or damages in Louisiana. Compare also Article 3549 of the Louisiana Civil Code.[1] It is well settled that the United States, or any agency thereof, is not bound by state statutes of limitation or subject to the defense of laches in enforcing a public right. *United States v. Summerlin*, 1940, 310 U.S. 414, 416. The National Labor Relations Board "does not exist for the 'adjudication of private rights'; it 'acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining.' *National Licorice Co. v. Labor Board*, 309 U.S. 350, 362; and see *Amalgamated Utility Workers v. Edison Co.*, 309 U.S. 261." *Phelps Dodge Corp. v. Labor Board*, 1941, 313 U.S. 177, 193. The fact that these proceedings operate to confer an incidental benefit on private persons does not detract from this public purpose. See *Jacksonville Paper Co. v. Tobin*, 5 Cir. 1953, 206 F. 2d 333, 334, 335; *Croedow v. Randolph*, 5 Cir. 1948, 165 F. 2d 918, 919, 920.

There is no indication that Congress intended to overrule this long-settled doctrine by the enactment of the Administrative Procedure Act, 5 U.S.C.A. 1001, et seq. Indeed, sections 6(a)[2] and 10(e) of that Act[2] gave Nabors a remedy to "compel agency action . . . unreasonably delayed."

---

[1] Construed in Wright v. Lumbermens Mutual Casualty Co., 5 Cir. 1957, 242 F. 2d 1; Lumbermens Mutual Casualty Co. v. Wright, No. 19070, 5 Cir. 1963, ms.

[2] 5 U.S.C.A. §§ 1005(a) and 1009(e).

We agree with the Board that the claims set forth in the back pay specifications are not barred by limitations or laches, and further that the evidence offered by the petitioner to show irreparable injury caused by the delay was irrelevant.

The petitioner urges very strongly that "profit shares" should not have been included in the computation of the gross back pay of the claimants. The relevant facts as to the profit shares are undisputed and are well narrated in the examiner's findings:

> "... Respondent started distributing profit shares to his employees between 1916 and 1920 and with relatively few exceptions continued that practice until July 1959, when he sold his business. The profit share, as its name indicates, was derived from a percentage of the profits. On each occasion when a profit share payment was to be made, Respondent unilaterally determined what percentage of profits for the period covered he would allocate to the clock (production) employees and thereupon allocated that sum without discrimination among those employees on the basis of the regular hours of employment each employee had put in during that period. The sole requirement for eligibility to receive such profit shares was that the employee be on Respondent's payroll at the time payment was made. If an employee had been terminated for any reason whatever on the date payment was made, he was not eligible for such payment. An additional requirement that the employee be in 'good standing' meant merely, according to Respondent, that the employee be on the payroll on the date of payment.
>
> "Pursuant to the foregoing formula, Respondent throughout the back pay period made profit share payments to his incumbent employees semiannually in June and December of each year. The only exception was in June 1949, when no payment of profit shares was made and none was credited for that period in the Back Pay Specification."

"As indicated above, the profit share payment although paid with considerable regularity was a purely voluntary and gratuitous act on the part of Respondent and was wholly within his discretion. There was no contract, promise, or other commitment by Respondent either to pay a profit share at all or to pay it in any specific amount or manner. The percentage of profits allocated for that purpose varied from year to year, as Respondent saw fit. Respondent on numerous occasions told the employees that the profit share was not part of their pay. In Respondent's own words, the profit share was the product of 'an earnest effort to try to share the profits of the business with my employees as if they might have owned capital stock in the business without having them actually own it and participate in the management.' Moreover, Respondent did not take profit share payments into consideration in determining the regular hourly rate of each employee, and agents of the Wage and Hour Division of the Department of Labor who were apparently familiar with Respondent's practices in that regard made no remonstrance. Similarly, the profit share payments were not taken into account in determining Respondent's premium rate for coverage under the Louisiana Workmen's Compensation Act under which premiums are determined on the basis of a percentage of the compensation paid to the employees."

"On the other hand, the amount of the profit share paid to each employee varied in direct ratio with the number of regular hours he worked during the relevant period and no other considerations entered into the determination of that amount. Taxes and social security payments were withheld from the profit shares just as they were from the regular pay of the employees. In fact, the employee received only one W-2 form at the end of the year which reflected both his regular and overtime pay and his profit share payments. Finally, Respondent often told his employees that they received the profit shares because they 'earned' them and that 'they would earn more money and I could pay more money by co-operating on that basis.'"

The examiner found that the back pay claimants are entitled to profit shares calculated on the same basis as the profit shares received by comparable employees who continued to work on equivalent jobs during the back pay period.

It is, of course, settled that the authority of the Board to take affirmative action is remedial, not punitive. *Republic Steel Corporation* v. *NLRB*, 1940, 311 U.S. 7, 11, 12. Its power as expressed in section 10(c), 29 U.S.C.A. § 160(c), is "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this sub-chapter." In effectuating the policies of the Act, the Board has taken the position that the "make whole" concept does not turn on whether the pay was wholly obligatory or gratuitous, but on the restoration of the *status quo ante*. See *Moss Planing Mill Co.*, 140 NLRB 933, 935, enforced as modified on other grounds, *NLRB* v. *Moss Planing Mill Co.*, 4 Cir. 1958, 256 F. 2d 653, 654. In that case there was included in back pay an amount representing clothing given gratuitously as Christmas gifts. The Board's discretion to take such affirmative *remedial* action as will effectuate the purposes of the Act includes more than placing the employee in position to assert contractual or legally enforcible obligations. "Back pay" as used in section 10(c) includes the moneys, whether gratuitous or not, which it is reasonably found that the employee would actually have received in the absence of the unlawful discrimination. That principle seems to us so clear as to make unnecessary a discussion of the many persuasive authorities cited in the briefs of both parties. We cannot hold that the Board erred in including "profit shares" in the computation of the gross back pay of the claimants.

Petitioner insists that each of the claimants under consideration would have been terminated during the regular

reduction of petitioner's work forces during the period January 1 - May 25, 1949.

The examiner and the Board agreed that two of the discriminatees would have been terminated by May 25, 1949, but not the other nine. Proof that the employer had no available jobs was an affirmative defense and the burden of establishing it rested upon the employer. *NLRB* v. *Cambria Clay Products Co.*, 6 Cir. 1954, 215 F. 2d 48, 56. We cannot say that the Board's findings are not supported by substantial evidence on the record considered as a whole. 29 U.S.C.A. § 160(e).

Petitioner takes the position that this Court held in *NLRB* v. *Armstrong Tire & Rubber Co.*, 5 Cir. 1959, 263 F. 2d 680, rehearing denied 265 F. 2d 212, that an employee who engages in self-employment and who at the same time does not make an adequate, good faith effort to obtain other employment, has thereby removed himself from the labor market, and terminated his right to claim back pay during his self-employed period. To the contrary, that decision recognized the principle invoked by the Board:

> "... that *bona fide full self employment* will be regarded as complying with the obligation imposed upon a discharged employee to use reasonable diligence to keep himself in gainful employment and thus discharge his obligation of minimizing or mitigating his damages instead of failing to do so and looking to the employer to make good his self imposed losses." (263 F. 2d at 683).

It merely held that the Board's conclusion arose "from a misapprehension or misjudgment of the proven facts and the unpermissible application to them of the principle invoked by the Board," that is, in short, that the employee's part-time work in his wife's icehouse was not *bona fide* self-employment.

Petitioner argues that Hatcher's back-pay award should be stricken in its entirety because Hatcher testified at the hearing that he desired to withdraw his claim, that he did not care anything about the case, and that he did not think the Company owed him a thing. Prior to the hearing Hatcher had cooperated with Board agents. The Examiner and the Board held that the withdrawal was ineffective. The authorities support their conclusion that the purpose of these back-pay awards is to deter unfair labor practices and not to enforce the private rights of the employees.

> "The Board is not, as respondents suggest, merely the statutory representative of the employees for recovery of their losses. Its primary function under § 10, in connection with which it makes specific monetary orders for specific employees, is to prevent conduct defined as unfair labor practices in § 8."

NLRB v. *Deena Artware, Inc.*, 1960, 361 U.S. 398, 411-12 (concurring opinion). As this Court stated in *Waterman S.S. Corp.* v. *NLRB*, 5 Cir. 1941, 119 F.2d 761, 762:

> "The requirement in the Board's order to make whole the men who were illegally discharged was not made to vindicate the private rights of the men, but the policies of the National Labor Relations Act . . . ."

See *Nathanson* v. *NLRB*, 1952, 344 U.S. 25, 27. In *NLRB* v. *E. A. Laboratories, Inc.*, 2 Cir. 1951, 188 F.2d 885, cert. denied 342 U.S. 871 (1951), it was held that the waiver of claims to back pay made by a union for its members, and not sanctioned by the Board, does not prevent the Board from ordering back pay. Thus the Board could properly elect to ignore Hatcher's withdrawal of his claim.

Petitioner contends that even if it is found that profit shares can be included in the computation of gross back pay, certain profit share payments should not have been

included in the awards to McNeese, Hatcher, and Roark. It is pointed out by petitioner that on the dates some of the profit share payments were made these employees were found by the Examiner and Board to be willfully idle. Yet a portion of these payments were included, on a pro rata basis, in their back pay. The already quoted findings of the Examiner clearly state that the sole requirement for eligibility to receive profit shares was that the employee be on the payroll at the time the payment was made, and any employee terminated before that date was not eligible. Accordingly, we think that if any of the employees involved in this suit were retired from the labor market at the date of payment, the entire profit share should be excluded from his gross back pay. In the case of McNeese, the profit share declared December 31, 1950, should have been excluded entirely, rather than prorated on a quarterly basis. Contrary to petitioner's contention, however, the shares paid in June 1951 and June 1952 were excluded in their entirety by the Examiner. As to Hatcher, the share distributed June 1, 1948, should not have been allotted pro rata over a twelve-week period, nor should the share paid June 1950 have been apportioned on a quarterly basis; but the profit shares paid in December 1948 and December 1949 were properly excluded in toto. As to Roark, the profit share paid June 1, 1948, should have been totally excluded.

In addition to the foregoing contentions, the petitioner, in the course of a brief covering some 117 printed pages, insists separately as to each employee and on many items that the Board's findings are not supported by substantial evidence on the record considered as a whole. In accordance with *Universal Camera Corp.* v. *NLRB*, 1951, 340 U.S. 474, 488, we may not displace the Board's choice between two fairly conflicting views, even though we would justifiably have made a different choice had the matter been before

us *de novo*. See *NLRB v. Walton Mfg. Co.*, No. 18198, 5 Cir., Sept. 5, 1963, mfs. The sole responsibility for determinations of credibility rests with the Board, and we are bound by its conclusions. *NLRB v. Ferguson*, 5 Cir. 1958, 257 F. 2d 88.

We have considered carefully each of petitioner's contentions as to the evidence supporting the awards for the various employees and shall here briefly discuss the main points so raised. As to Jeter C. Adams, petitioner asserts that he did not make a good faith attempt to obtain other employment, in that Adams looked only for work which would afford him the kind of living which he was making when he lost his job and that he failed to apply to all the possible employers in the area. It is also argued that Adams did not testify with any definiteness or clarity as to his interim expenses. The Board found that Adams had made a good faith effort to obtain employment — he was employed, either for himself or others, all but a small segment of the seven-year period; he testified to extensive efforts to obtain gainful employment; and he held jobs in different fields of endeavor. We believe that there is substantial, credible evidence in the record as a whole to support the Board's conclusion. The burden of proving a failure to make a reasonable search for other employment rests upon the employer. *NLRB v. J. G. Boswell Co.*, 9 Cir. 1943, 136 F. 2d 585, 597. As to expenses, it should be recalled that in many instances over ten years had passed from the date they were incurred until the time of trial. Under these circumstances, we believe that the estimate of expenses formed a sufficiently adequate basis on which the Examiner and the Board could reach a reasoned conclusion.

Petitioner claims that Jesse L. Brown also made an insufficient search for work; that the proof did not establish a trip to Lufkin, Texas, for which expenses were allowed;

that the distance of ten miles from Brown's home to petitioner's plant should have been deducted from the trip expenses; and that there was no proof of the mileages to the various cities. Again, there is substantial evidence that this employee made a good faith effort to obtain work. We will not challenge the Board's determination as to the credibility of Brown's testimony that he did make the trip to Lufkin. The Board could properly, judicially notice the distance between cities, see 9 Wigmore, *Evidence* § 2581 (3d ed. 1940); and the distance from Brown's home to the plant was, not, in fact, included in the computation.

Petitioner asserts that during one period of unemployment Leroy P. Brown sought only construction work at great distances away. It is further contended that the expenses for these trips seeking employment should be excluded because of failure to investigate local opportunities. There was substantial evidence to support the Board's finding that Leroy P. Brown did make a good faith effort to obtain employment and agree with the Board that the trips for which expenses were allowed were reasonable. Petitioner should be aware that the trip to Hobbs, Texas, which he so strongly complains of, was expressly disallowed by the Examiner in his report, based on a finding that it was not made in search of employment.

Petitioner asserts that no back pay should be allowed Vernon D. Davis from July 31, 1954 to August 5, 1954, while he was physically unable to work. The Board did, however, disallow this period. It is contended that from the time Davis quit a job for personal reasons no back pay should be allowed. Nevertheless, we agree with the Board that the back pay should resume when he obtained another job. There was some question as to the number of trips made to Longstreet, Louisiana, but it appears that some allowance was made for the days on which Davis did not drive.

The significant contentions as to Henry Hatcher have already been discussed. The only new contention made by petitioner as to Alex C. Lafitte is that there should not be included in his gross back pay a two-week period in which Lafitte did not work for his interim employer because of a strike. However, the record shows that Lafitte was not idle during this period — he looked for other work, and, in fact, did work elsewhere for three or four days, and was ready to come back to work whenever the personnel office informed him he could do so. Petitioner complains of a $40 expense item, but this was expressly excluded by the Examiner.

As to L. W. McNeese, petitioner asserts that he only looked for oil field work and that the nature of this work was such that he would be laid off for short periods. But there is credible evidence that he did look for other work during periods in which he was laid off.

There are no additional contentions as to William D. Roark. Petitioner suggests that Lawrence L. Whitten's testimony as to search for employment is unreliable because certain other parts of his testimony were impeached. As already stated, we will not attempt to pass on matters of credibility.

The evidence supports a conclusion that Thomas J. Williams did make exhaustive efforts to find various kinds of work. Petitioner objects to expenses of Willie C. Williams for four trips on which he rode with someone else, but the record shows that no claim was made for these trips. There is substantial evidence that all times he had at least part-time employment and on those occasions was looking for a full-time job.

The relatively slight modifications which we have indicated in the Board's supplemental decision and order are

we think, susceptible of ready, indeed, mathematical computation by the Board, and for such purpose only the cause is remanded to the Board. The Board's supplemental decision and order, as corrected and modified, will be enforced.

MODIFIED AND ENFORCED.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

[SEAL]

By /s/ CLARA R. JAMES
Deputy

New Orleans, Louisiana Dec. 19, 1963

APPENDIX "B"

U. S. Court of Appeals, Filed Nov. 19, 1963.
Edward W. Wadsworth, *Clerk*

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19530

W. C. Nabors d/b/a W. C. Nabors Company,
Petitioner,

v.

National Labor Relations Board,
Respondent.

SUPPLEMENTAL DECREE

Before: Rives, Jones and Brown, Circuit Judges.

This Court having on June 28, 1952, entered its decree enforcing the original order of the Board of April 19, 1950, which directed, *inter alia*, that petitioner make whole certain employees for any loss of pay they may have suffered because of the unlawful discrimination practiced against them; and the Board having conducted a formal backpay proceeding for the purpose of defining the specific amounts of backpay due said employees under this Court's decree, and having issued its Supplemental Decision and Order setting forth those amounts; and the Petitioner having thereafter petitioned this Court for review and the Board, on cross-motion, for enforcement of the said orders; and this Court on October 3, 1963, having granted enforcement of the Board's supplemental order with directions for modification of the amounts of backpay to which certain of the employees involved herein are entitled, and for this purpose only remanding the cause to the Board; it is hereby

ORDERED, ADJUDGED AND DECREED that the Respondent, W. C. Nabors d/b/a W. C. Nabors Company, its agents, successors, and assigns, shall pay to the employees listed below net backpay in the following amounts:

Jeter C. Adams	$12,876.69
Jessie L. Brown	17,845.34
Leroy P. Brown	1,063.94
Vernon D. Davis	16,872.57
Alex C. Lafitte	10,188.15
Lawrence L. Whittico	2,374.82
Thomas J. Williams	10,628.38
Willie T. Williams	12,951.43

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this cause be, and it hereby is, remanded to the Board for modification of the Board's order with respect to the computation of net backpay to which the following employees are entitled in accordance with the Court's opinion:

HENRY J. HATCHER

LUTHER W. MCNEESE

WILLIAM D. ROAES

ENTERED:

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 713

W. C. NABORS, D/B/A W. C. NABORS COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-13a) is reported at 323 F. 2d 686. The Board's supplemental decision and order (P.A. 216-275, 305-309)[1] are reported at 134 NLRB 1078.

JURISDICTION

The supplemental decree of the court of appeals (Pet. 15a-16a) was entered on November 19, 1963.

[1] References to the Appendix to petitioner's brief in the court below will be designated "P.A."; references to the Appendix to the Board's brief will be designated "R.A." References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

The petition for a writ of certiorari was filed on December 28, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the doctrine of laches or a state statute of limitations applies to a Board proceeding to determine the amount of back pay due employees who, in violation of Sections 8(a) (3) and (1) of the National Labor Relations Act, were discharged for union activities.

2. Whether, in computing the gross back pay due employees discharged in violation of the Act, the Board properly included the profit shares regularly paid by the employer to its employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act are set forth in the petition (Pet. 3–6). The relevant provisions of the Board's rules and regulations are set forth in the Appendix (*infra*, pp. 10–12).

STATEMENT

A. The Board Proceeding

1. Background

In *W. C. Nabors Co.*, 89 NLRB 538, decided April 19, 1950, the Board held that petitioner Nabors violated Sections 8(a) (3) and (1) of the Act by selecting the employees for an economic layoff on the basis of union activity. The Board ordered Nabors to offer reemployment to 17 of the 19 discriminatees, the other two having disclaimed any interest in rein-

statement, and to make all 19 whole for any losses suffered. Nabors refused to comply with the order, and the Board petitioned the court below for enforcement. On April 29, 1952, the court enforced the Board's order in full. *National Labor Relations Board* v. *Nabors,* 196 F. 2d 272 (C.A. 5). Nabors then petitioned for certiorari, which was denied on October 27, 1952. 344 U.S. 865.

In February 1955, after attempts to secure compliance with the court's order proved unsuccessful, the Board initiated civil contempt proceedings in the court below against petitioner. On May 31, 1955, that court entered an order which, *inter alia,* approved a stipulation providing for the reinstatement of certain employees. The order also provided that "the questions relating to making whole the employees named in the Decree for losses sustained by them were subject to final determination by interlocutory hearings before the National Labor Relations Board and Proceedings before this Court." (Pet. 1a–2a; R.A. 660–661).

Pursuant to the Board's rules an investigation was made of petitioner's records for the purpose of drawing up a backpay specification.[2] This specification,

[2] The specification shows in detail, for each employee, "the back-pay periods broken down by calendar quarters, and specific figures and basis of computation as to gross back-pay and interim earnings, the expenses for each quarter, the net back-pay due, and any other pertinent information" (29 CFR 102.53, Appendix, *infra,* p. 10). It is served upon the respondent, who is required to file an answer, and, after issue is thus joined, the matter proceeds to formal hearing before a trial examiner of the Board (29 CFR 102.54, 102.59, Appendix, *infra,* pp. 10–12).

some 140 pages in length, was served on petitioner on March 25, 1959 (P.A. 218–219; 2018).[3] Petitioner filed a detailed answer (P.A. 19–80), and the matter then went to hearing before the Trial Examiner, who issued his report on September 9, 1960 (P.A. 216–275). Petitioner filed exceptions to the report, and, on December 7, 1961, the Board issued its supplemental decision and order affirming the Trial Examiner (P.A. 305–309).[4]

2. The Board's Decision

The Board found that 11 of the 19 discriminatees were entitled to backpay, in amounts ranging from $544.86 to $16,872.57, and ordered petitioner to pay those sums (P.A. 308, R.A. 720). The Board computed the gross backpay due each discriminatee[5] on the basis of the weekly wages paid to employees who worked for petitioner in the same or equivalent job classifications throughout the relevant backpay period. To these amounts the Board added the profit shares which were paid to the incumbent employees in June and December of each year, except that for 1949, when those employees did not receive a profit share in June, only the December payment was included (P.A. 227–228, 233, 3–4; R.A. 558–559, 564, 571–572; Backpay Spec. App. A–1, B–1, C–1). These profit shares

[3] The appendices to the specification were not reprinted but were lodged with the court below in manuscript form.

[4] The Board issued a correction to the order on March 29, 1962 (R.A. 720–721).

[5] Gross backpay is the sum the employee would have earned had he remained in petitioner's employ, before deduction of any earnings which he may have obtained from other employment.

represented a percentage of the profits, determined unilaterally by petitioner (P.A. 232, 233; R.A. 560–563). They were given to all production employees on the payroll at the time payment was made, on the basis of the time each employee had worked during the bonus period (P.A. 232; R.A. 560).

The Board rejected petitioner's contention that, since the profit shares were paid on a purely voluntary and discretionary basis, they could not properly be included in the computation of backpay. The Board concluded that petitioner had recognized that the profit shares were in reality wages;[6] and that, in any event, the term "wages," as used in the Act, includes all emoluments of value, including gratuities, arising out of the employment relation (P.A. 232–237).

Petitioner also contended that, because of the long delay between the end of the contempt proceeding and the issuance of the backpay specification, the proceeding was barred by the doctrine of laches and by the statute of limitations of the State of Louisiana. The Board rejected this contention on the ground that neither the doctrine of laches nor State statutes of limitations apply to an agency of the United States Government in proceedings involving the exercise of

[6] Petitioner often told his employees that they received the profit shares because they "earned" them, and that "they would earn more money and I could pay more money by cooperating on that basis" (P.A. 234; R.A. 563). Moreover, taxes and social security payments were withheld from the profit shares on the same basis as they were from the regular pay of the employees (P.A. 234; 169–171, R.A. 565, 599). And, each employee received only one W-2 form at the end of the year which lumped in one total the remuneration he received both weekly and through his profit share payments (P.A. 565, 596–597).

its public or governmental functions (P.A. 307, n. 3; see also, P.A. 225).

B. The Court of Appeals' Decision

With slight modifications, the court of appeals enforced the Board's backpay order in full (Pet. 1a–13a).

ARGUMENT

The decision of the court of appeals is correct, and is not in conflict with the decision of any other circuit. There is no occasion for further review.

1. Petitioner's contention (Pet. 11–18) that the back pay claims were barred by the doctrine of laches or by Louisiana's one-year statute of limitations is contrary to the settled principle, applied by the Board and the court below, that the United States, or any agency thereof, is not bound by such restrictions in enforcing a public right. See *United States* v. *Summerlin*, 310 U.S. 414, 416, and cases there cited.[7] Nor is petitioner aided by the holding in *Nathanson* v. *National Labor Relations Board*, 344 U.S. 25, 27, that a backpay claim, enforceable by the Board, is not "a debt due to the United States within the meaning of R.S. § 3466, and therefore entitled to priority under § 64(a)(5) of the Bankruptcy Act." The basis for this holding was not, as petitioner suggests (Pet.

[7] To subject Board proceedings to the restrictions imposed by state statutes of limitations would also run counter to Congress' desire to obtain a uniform administration of the law governing labor-management relations in industries affecting commerce. See *Garner* v. *Teamsters Union*, 346 U.S. 485, 490; *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 122–124; *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 365.

13–14), that the Board, in enforcing a back pay claim, is merely enforcing a private right. On the contrary, the Court specifically recognized that a "back pay order is a reparation order designed to vindicate the public policy of the statute" (344 U.S. at 27),[8] but concluded that, notwithstanding its public character, it did not qualify for the governmental priority under the Bankruptcy Act, which was designed only "'to secure an adequate revenue to sustain the public burthens and discharge the public debts'" (*id.*, at 27–28).[9]

The situation here is entirely distinguishable from that in *United States* v. *Beebe*, 127 U.S. 338 (Pet. 12). The suit there, although brought by the government, was purely for the vindication of private rights. As the Court noted, "the Government, though in name the complainant, is not the real contestant party to the title or property in the land in controversy. It has no interest in the suit, and has nothing to gain from the relief prayed for, and nothing to lose if the relief is denied. * * * [T]he right asserted is a private right, which might have been asserted without the intervention of the United States at all." 127 U.S. at 346. Here, on the other hand, the Board is the only party which can institute a backpay proceeding, and, as shown, its purpose is to vindicate the public interest

[8] See also *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 197.

[9] The limited nature of the holding in *Nathanson* is confirmed by Mr. Justice Frankfurter's concurring opinion in *National Labor Relations Board* v. *Deena Artware, Inc.*, 361 U.S. 398, 412, n. 3. The Court in *Deena* reversed the judgment of the Sixth Circuit, relied on by petitioner (Pet. 13).

and not merely the private rights of the employees involved.

2. There is no substance to petitioner's contention (Pet. 19–20) that the Board exceeded its authority by including the profit shares in the computation of gross back pay. The purpose of a back pay award is to "make whole" the employee for losses which he suffered as a result of the unlawful discrimination. See *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 197. Though petitioner was not obligated to make profit share payments to the employees, during the backpay period it did in fact elect to do so twice a year (except in 1949); thus, had the discriminatees been employed then (as they would have been but for petitioner's unlawful action), they would have received profit shares in addition to their regular wages. In these circumstances, as the court below found (Pet. 6a), the Board properly included the profit shares which the discriminatees would have received[10] in its computation of gross back pay. See *National Labor Relations Board* v. *Moss Planing Mill Co.*, 224 F. 2d 653, 654 (C.A. 4).

[10] As noted (p. 4), only one share was included for 1949, since petitioner made only one payment in that year.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1964.

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[11] Arnold Ordman, General Counsel of the National Labor Relations Board, has disqualified himself because he was the Trial Examiner who conducted the hearing in this case.

APPENDIX

The relevant portions of the National Labor Relations Board Rules and Regulations, Series 8 as amended, 29 CFR 102.52, *et seq.*, are as follows:

SEC. 102.52 *Initiation of proceedings.*— After the entry of a Board order directing the payment of backpay or the entry of a court decree enforcing such a Board order, if it appears to the regional director that a controversy exists between the Board and a respondent concerning the amount of back pay due which cannot be resolved without a formal proceeding, the regional director shall issue and serve upon all parties a back-pay specification in the name of the Board. The specification shall contain or be accompanied by a notice of hearing before a trial examiner at a place therein fixed and at a time not less than 15 days after the service of the specification. * * *

SEC. 102.53 *Contents of back-pay specification and of notice of hearing without specification.*—(a) *Contents of back-pay specification.* Where the specification procedure is used, the specification shall specifically and in detail show, for each employee, the back-pay periods broken down by calendar quarters, and specific figures and basis of computation as to gross back pay and interim earnings, the expenses for each quarter, the net back pay due, and any other pertinent information.

* * * * *

SEC. 102.54 *Answer to specification; no requirement for answer to notice of hearing issued without back-pay specification.*

(a) *Filing and service of answer to specifications.*—The respondent shall, within 15 days

from the service of the specification, if any, file an answer thereto; an original and four copies shall be filed with the regional director issuing the specification, and a copy thereof shall immediately be served on any other respondent jointly liable.

(b) *Contents of the answer to specification.*—The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the post office address of the respondent. The respondent shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification denied. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross back pay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to the specification.*—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be true and en-

ter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation.

* * * * * *

SEC. 102.55 *Extension of time for filing answer to specification.*—Upon his own motion or upon proper cause shown by any respondent, the regional director issuing the specification may by written order extend the time within which the answer shall be filed.

SEC. 102.56 *Extension of date of hearing.*—Upon his own motion or upon proper cause shown, the regional director issuing the specification or notice of hearing without specification may extend the date of hearing.

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SEC. 102.58 *Withdrawal.*—Any such specification or notice of hearing without specification may be withdrawn before the hearing by the regional director on his own motion.

SEC. 102.59 *Hearing; posthearing procedure.*—After the issuance of a notice of hearing with or without back-pay specification, the procedures provided in sections 102.24 to 102.51, shall be followed insofar as applicable.

U. S. GOVERNMENT PRINTING OFFICE: 1964